

The "privacy" aspect so prominent in *Stanley* is absent in this setting. The power of customs officials to search luggage is a well-settled aspect of the power to prevent smuggling. It is highly unlikely, in light of the need to search for ordinary contraband and to prevent commercial importation of obscene materials, that the scope of searches would be significantly affected by immunizing importation for personal use. Thus such a rule would yield no measurable gain for individual privacy.

The creation of a constitutional right of importation for private use would seriously undercut the prohibition of commercial importation, since ordinarily it cannot be ascertained if a claim that materials are for private use is honestly made. Once materials pass through customs, it would be virtually impossible to trace them in order to assure that they are not used commercially, and thus the enforcement of other federal and state laws against the dissemination of obscene materials would be rendered more difficult. This impairment of concededly legitimate statutes would be justified if a constitutional right were involved, but the prohibition of importation of obscene materials for private use is consistent with this Court's constitutional decisions and does not restrict protected speech or interfere significantly with privacy.

#### ARGUMENT

#### CONGRESS HAS THE POWER TO PROHIBIT IMPORTATION OF OBSCENE MATTER FOR PRIVATE USE

Last Term, this Court in *United States v. Reidel*, 402 U.S. 351, and *United States v. Thirty-Seven* (37)

*Photographs*, 402 U.S. 363, reaffirmed its decision in *Roth v. United States*, 354 U.S. 476, 485, that "obscenity is not within the area of constitutionally protected speech or press." In *Reidel* it held that Congress may constitutionally prevent the mails from being used for distributing pornography even to willing recipients who state they are adults. In *Thirty-Seven (37) Photographs*, it sustained the power of the United States to prohibit the commercial importation of obscene matter. These decisions confirm the import of many earlier cases, e.g., *Roth v. United States*, 354 U.S. 476; *Manual Enterprises v. Day*, 370 U.S. 478; *Ginzburg v. United States*, 383 U.S. 463, that there is no constitutionally established right to purchase obscene materials. If, as is clear, Congress and the states may prohibit the sale and purchase of obscene materials without violating the First Amendment, then it follows that Congress with its broad powers over foreign commerce, may forbid the importation of obscene materials by those who have purchased them abroad, even if those attempting to import the materials claim they are for private use. As we show below, the contention that Congress lacks such power rests upon a reading of *Stanley v. Georgia*, 394 U.S. 557,<sup>4</sup> that is unduly broad as *Reidel* and *Thirty-Seven (37) Photo-*

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<sup>4</sup> See *United States v. Thirty-Seven (37) Photographs*, 309 F. Supp. 36 (C.D. Calif.), upon which the court below relied. See also *United States v. Various Articles of "Obscene" Merchandise*, 315 F. Supp. 191 (S.D. N.Y.), probable jurisdiction noted, May 17, 1971, No. 796, Oct. Term, 1970, dismissed pursuant to Rule 60, June 23, 1971.

*graphs* indicate. In *Stanley*, this Court held only that the First Amendment does not permit governmental authority to interfere with an individual's right privately to possess obscene materials in his own home. It did not establish that an individual has a First Amendment right to bring obscene items into his own home so long as he is able to buy them abroad.

# I.

## STANLEY V. GEORGIA RESTS ON THE PRIVACY OF THE HOME AND DOES NOT CREATE A RIGHT WHICH OVERRIDES THE SWEEPING POWER OF CONGRESS TO REGULATE FOREIGN COMMERCE

In *Stanley v. Georgia*, 394 U.S. 557, state agents entered appellant's home under a search warrant which authorized them to seize evidence of book-making. In the course of the search, they unexpectedly discovered a roll of motion picture film and a projector. They viewed the film, concluded it was obscene, and arrested appellant. He was convicted under state law for "knowingly hav[ing] possession of \* \* \* obscene matter." 394 U.S. at 558. Proceeding on the assumption that the film was obscene, this Court nonetheless reversed the conviction, holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." 394 U.S. 568. The Court's opinion indicated that the decision was essentially grounded on a combination of the Fourth Amendment proscription of

“unwanted governmental intrusions into one’s privacy” (*id.* at 564) and the First Amendment prohibition of governmental “control [over] the moral content of a person’s thoughts” (*id.* at 565).

In *Stanley*, this Court did not say that materials otherwise obscene are somehow rendered non-obscene because they are privately possessed; nor did it hold that anyone has a constitutional right to obtain obscene materials for home viewing. Rather, it protected an individual’s right to privacy in his own home, in the circumstances of that case, whether or not materials of the sort in question might be subject to the obscenity laws in a different context. Quoting Mr. Justice Brandeis’ classic language about “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men” (dissenting in *Olmstead v. United States*, 277 U.S. 438, 478),<sup>\*</sup> the Court noted that “fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy” (394 U.S. 564). In another context, Mr. Justice Harlan has written of the law’s “solicitude to protect the privacies of the life within” the home, dissenting in *Poe v. Ullman*, 367 U.S. 497, 551, and clearly this solicitude underlay the result in *Stanley*, as it underlay the decision in *Griswold v. Connecticut*, 381 U.S. 479.

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<sup>\*</sup> See *Rowan v. Post Office*, 397 U.S. 728, in which this Court concluded that a householder could refuse to receive material that he considered to be obscene.

This right to be free from governmental interference with the possession of obscenity in one's home does not carry with it the right to override all other governmental powers in order to obtain obscene material. *Stanley*, to be sure, mentioned a "right to receive information and ideas, regardless of their social worth" (394 U. S. at 564). In the context of that case, that meant that a homeowner had a right to receive any material in his home for his own personal use without subjecting his home to search (on a warrant obtained for another purpose) and without subjecting himself to prosecution for possession in his home. A person might hesitate to bring a book or object into his home if to do so would open the door to a governmental intrusion on that private area. Since "the line between speech unconditionally guaranteed and speech which may be legitimately regulated, suppressed, or punished is finely drawn," *Speiser v. Randall*, 357 U.S. 513, 525, to subject homeowners to searches for possession of obscene materials would induce self-censorship reaching to protected speech, cf. *Smith v. California*, 361 U.S. 147, and would generate a "chilling effect" upon the exercise of the First Amendment right to peruse materials that are not obscene.\* Thus, we submit the central thought of *Stanley* is not that the particular books or films an individual has and uses in the privacy of his home or office constitute speech

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\*Even though obscene materials may not constitute speech protected by the First Amendment, the history of obscenity cases in this Court teaches that obscenity is often not self-identifying; there must be a careful examination to determine the issue in each case, and on one side of the line the materials involved are protected.

protected by the First Amendment, but rather that the panoply of values which the First Amendment, the Fourth Amendment, and other provisions of the Bill of Rights, seek to protect (cf. *Griswold v. Connecticut*, 381 U. S. 479) would be too endangered by the necessarily intrusive inquiry to determine the nature of materials possessed in the home.

## II.

UNITED STATES v. REIDEL AND UNITED STATES v. THIRTY-SEVEN (37) PHOTOGRAPHS ESTABLISH THAT THERE IS NO RIGHT TO PURCHASE OBSCENE MATERIALS IN THIS COUNTRY OR HAVE THEM SENT FROM ABROAD AND IT WOULD BE ODD TO CREATE A RIGHT OF IMPORTATION FOR THOSE WHO PERSONALLY PURCHASE OBSCENE MATERIALS ABROAD

*United States v. Reidel, supra*, and *United States v. Thirty-Seven (37) Photographs, supra*, make clear that there is no broad constitutional "right to receive" obscene materials for private use. *Reidel* rests on the previously well-established principle that the federal government can prohibit the commercial dissemination of obscene materials through the mails. Mr. Justice White's majority opinion states that "Nothing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned" and indicates the irrelevance of *Stanley* for those "who have no claim \* \* \* about unwanted governmental intrusions into the privacy of their home" (402 U.S. at 354, 355). Mr. Justice Harlan, concurring, noted that *Stanley* did not undercut *Roth*, which "means that

government may proscribe obscenity as such rather than merely regulate it with reference to other state interests \* \* \* (402 U.S. at 358).

*Thirty-Seven (37) Photographs* decided that 19 U.S.C. 1305(a), the same statutory provision involved in this case, is constitutional insofar as it prohibits the importation of obscene materials for commercial distribution and provides for the seizure at customs and ultimate forfeiture of such materials. In the part of Mr. Justice White's majority and plurality opinion joined by the Chief Justice, Mr. Justice Brennan, and Mr. Justice Blackmun, the claim that the provision is overbroad in reaching importation for private use is rejected because "a port of entry is not a traveler's home" and *Stanley* does not "extend to one seeking to import obscene materials from abroad, whether for private use or public distribution" (402 U.S. at 376).<sup>1</sup>

If the federal government can forbid the mailing and importation of obscene materials for commercial purposes, and the states can forbid the sale of such materials, see, e.g., *Alberts v. California* (decided with *Roth v. United States*), 354 U.S. 476; *Memoirs v. Massachusetts*, 383 U.S. 413, there is plainly no constitutionally established right to purchase such materials for private use. Since the federal government has con-

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<sup>1</sup> Mr. Justice Stewart, concurring, intimates a different view about the relevance of *Stanley* to importation for private use (402 U.S. at 379), but his opinion does not consider the very significant difference between invasion of the home to investigate possible criminal charges and the refusal to allow obscene materials through Customs.

control over mail from foreign sources at least equivalent to its control over purely domestic mail and 18 U.S.C. 1461 covers such mail, there is clearly no right to receive by mail obscene materials commercially disseminated from abroad. In light of these established principles, it would be odd to hold that one who does not have a constitutional right to purchase obscene materials inside this country or by mail from abroad does have a constitutionally protected right to bring into this country through the channels of foreign commerce obscene materials he has purchased abroad.

### III.

#### THE PROHIBITION OF IMPORTATION OF OBSCENE MATERIAL FOR PRIVATE USE DOES NOT SIGNIFICANTLY AFFECT THE SCOPE OF CUSTOMS SEARCHES OR "CHILL" THE IMPORTATION OF OTHER MATERIALS

The considerations at the heart of *Stanley* which forbid a state either to issue a warrant to search for obscene material in a private home, or to penalize a person for possession of such material in his home for his own personal use, are absent in a border search. A customs search at the nation's borders is different from a police search through a private library. An individual's luggage, as well as his person, has traditionally been subject to examination by governmental authorities at customs without probable cause or a search warrant; this has been explicitly authorized by federal statutes since at least 1866, 19 U.S.C. 482, 1582; *Carroll v. United States*, 267 U.S. 132, 150-154; *Boyd v. United States*, 116 U.S. 616, 623-624;

*Alexander v. United States*, 362 F. 2d 379, 382 (C.A. 9), certiorari denied, 385 U.S. 977. Cf. *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76. Constitutionally, it is rooted in the power of Congress "to regulate Commerce with foreign Nations." Article I, Section 8. Such searches are "intimately associated with excluding illegal articles from the country", *Thirty Seven (37) Photographs*, 402 U.S. at 376, and are necessary unless the government's legitimate objective of preventing smuggling is severely to be impaired. Because of this paramount governmental interest, property which in other circumstances is afforded greater protection is subject to examination at the border. Indeed, it is not too much to say that a person entering the country consents to such a search.

It would, of course, not be feasible to insulate all books, papers, and groups of photographs from border inspections, since they may be used to conceal ordinary kinds of contraband. Moreover, enforcement of Section 1305(a) as it applies to obscene matter for commercial dissemination, upheld in *Thirty-Seven (37) Photographs, supra*, requires examination of materials to see if they are obscene and likely to be used for commercial exploitation. In short, the scope of customs searches will not be affected by the way in which this case is decided, or it will be affected only insignificantly. Thus a decision that materials intended for private use can not be stopped at the border would yield no measurable gain for the privacy of individuals as they pass through customs. This is in complete contrast to the situation in *Stanley* where the funda-

mental principle of the privacy of the home was at stake.

In terms of the First Amendment value of interchange of ideas, see, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270; *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J. dissenting), whatever minimal effect Section 1305(a) might have on importation of protected material is much more significant in the context of materials for commercial dissemination than those for personal use. If the commercial distributor hesitates to import materials that are borderline but constitutionally protected, other persons will be deprived of access to these materials. But one who brings items into the country for personal use has already had a chance to look at the items he purchases. If he fails to bring them into this country, the effect on the open interchange of ideas will be minimal.

#### IV.

THE PROHIBITION AGAINST IMPORTATION FOR COMMERCIAL DISSEMINATION, AND OTHER LAWS AGAINST THE DISTRIBUTION OF OBSCENITY, CANNOT BE EFFECTIVE IF A RIGHT TO IMPORT IS GROUNDED ON THE IMPORTER'S STATED PROSPECTIVE USE OF OBSCENE MATERIALS

Enforcement of concededly valid laws against the importation and dissemination of obscenity would be seriously undercut if importation for private use were held to be protected. Such a ruling would make it extraordinarily difficult, if not impossible, to enforce Section 1305(a) as it relates to materials for commercial dissemination that are not self-identifying. With

few exceptions, the same material that could be imported for personal use could also be reproduced and sold, as indeed the materials in this case demonstrate. Customs officials will usually have no workable way of ascertaining the truth or falsity of an assertion that material is intended for private use; and once material is admitted it is effectively beyond the reach of the border screening process.

Moreover, there is no practical or feasible way to follow the property and see whether it is actually retained for private use only. Once the property has been admitted to the country, it is, for all practical purposes, a part of the general mass of property in the country.

It is unrealistic to hold that the Constitution requires that items may be imported for personal use, although Congress has the constitutional power to bar their importation for commercial purposes. Expansion of *Stanley v. Georgia* to cover this might be an example of what Justice Holmes wrote in *Hudson County Water Company v. McCarter*, 209 U.S. 349, 355, where he said:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. \* \* \*

And he added (209 U.S. at 357):

It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the dis-

puted ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. \* \* \*

In order to vindicate a right of privacy not clearly stated in the Constitution, the Court would surely not find a constitutional right to import narcotics for personal use. And there would not be a constitutional right to import diamonds for personal adornment, free of duty, on the ground that, for some, the wearing of diamonds is a kind of symbolic speech. In terms of privacy, there would appear to be no distinction between those cases and this. If it is sought to say that this case is different because it involves films, and the product of a printing press, examination of the materials should be a sufficient answer. This Court has decided that "obscenity is not within the area of constitutionally protected speech or press," *Roth v. United States*, 354 U.S. 476, 485, and reiterated that statement last Term. *United States v. Reidel*, 402 U.S. 351, 354.

To make importation of prohibited material turn on whether a claim is made of private use would be to reward those who plan commercial dissemination, but are disingenuous enough to say material is for private use and clever enough to import it in a manner that makes the claim plausible. Since material intended for commercial use will obviously be more often imported if importation for private purposes is immunized, enforcement of other federal and state laws will also be made more burdensome and less effective. This impairment of concededly legitimate stat-

utes would, of course, be warranted if compelled by the First Amendment or other constitutional protections, but forfeiture of obscene materials imported for private use is entirely consistent with this Court's constitutional decisions. It does not reach protected speech or interfere in any significant way with an individual's privacy.

#### CONCLUSION

The judgment of the district court should be reversed.

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SEPTEMBER 1971.